SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: Governmental Oversight and Productivity Committee

BILL: PCS/SB 1584

INTRODUCER: Governmental Oversight and Productivity Committee and Banking and Insurance Committee

SUBJECT: Open Government Sunset Review (Deferred Presentment Provider Database)

DATE: April 15, 2006 REVISED: _____ _____ _____ _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Deffenbaugh	Deffenbaugh	BI	**Favorable**
2.	Rhea	Wilson	GO	**Pre-meeting**
3.			RC	
4.				
5.				
6.				

I. Summary:

This bill is the result of an Open Government Sunset Review performed by the Committee on Banking and Insurance. The bill reenacts the exemption for the deferred presentment provider database that is maintained by the Office of Financial Regulation of all deferred presentment transactions. The bill clarifies the exemption by providing that information that identifies a drawer or a deferred presentment provider is confidential and exempt.

Further, the bill expressly permits a deferred presentment provider to access the information that it has entered into the database. The bill also expressly clarifies that the deferred presentment provider may obtain an eligibility determination for a particular drawer based on information in the database.

The exemption, which is scheduled for repeal on October 2, 2006, is also saved from repeal by the bill.

This bill substantially amends section 560.4041 of the Florida Statutes.

II. Present Situation:

Public Records – Florida has a long history of providing public access to government records. The Legislature enacted the first public records law in 1892.[1] The Florida Supreme Court has noted that ch. 119, F.S., the Public Records Act, was enacted

[1] Sections 1390, 1391, F.S. (Rev. 1892).

> . . . to promote public awareness and knowledge of government actions in order to ensure that governmental officials and agencies remain accountable to the people.[2]

In 1992, Floridians adopted an amendment to the State Constitution that raised the statutory right of access to public records to a constitutional level.[3] Article I, s. 24 of the State Constitution, provides that:

> (a) Every person[4] has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution. . . .

Unless specifically exempted, all agency[5] records are available for public inspection. The term "public record" is broadly defined to mean:

> All documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency.[6]

The Florida Supreme Court has interpreted this definition to encompass all materials made or received by an agency in connection with official business, which are used to perpetuate, communicate or formalize knowledge.[7] All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.[8]

Only the Legislature is authorized to create exemptions to open government requirements.[9] Exemptions must be created by general law and such law must specifically state the public necessity justifying the exemption. Further, the exemption must be no broader than necessary to accomplish the stated purpose of the law.[10] A bill enacting an exemption[11] may not contain other

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[2] *Forsberg v. Housing Authority of the City of Miami Beach*, 455 So.2d 373, 378 (Fla. 1984).
[3] Article I, s. 24 of the State Constitution.
[4] Section 1.01(3), F.S., defines "person" to include individuals, children, firms, associations, joint adventures, partnerships, estates, trusts, business trusts, syndicates, fiduciaries, corporations, and all other groups or combinations.
[5] The word "agency" is defined in s. 119.011(2), F.S., to mean "… any state, county, district, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law including, for the purposes of this chapter, the Commission on Ethics, the Public Service Commission, and the Office of Public Counsel, and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency."
[6] Section 119.011(11), F.S.
[7] *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So.2d 633, 640 (Fla. 1980).
[8] *Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979).
[9] Article I, s. 24(c) of the State Constitution.
[10] *Memorial Hospital-West Volusia v. News-Journal Corporation*, 729 So.2d 373, 380 (Fla. 1999); *Halifax Hospital Medical Center v. News-Journal Corporation*, 724 So.2d 567 (Fla. 1999).
[11] Under s. 119.15, F.S., an existing exemption may be considered a new exemption if the exemption is expanded to cover additional records.

substantive provisions, although it may contain multiple exemptions that relate to one subject.[12] A bill creating an exemption must be passed by a two-thirds vote of both houses.[13]

The Public Records Act[14] specifies conditions under which public access must be provided to records of the executive branch and other agencies. Section 119.07(1) (a), F.S., states:

> Every person who has custody of a public record shall permit the record to be inspected and examined by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record.

If a record has been made exempt, the agency must redact the exempt portions of the record prior to releasing the remainder of the record.[15] The records custodian must state the basis for the exemption, in writing if requested.[16]

There is a difference between records that the Legislature has made exempt from public inspection and those that are *confidential* and exempt.[17] If the Legislature makes a record confidential and exempt, such information may not be released by an agency to anyone other than to the persons or entities designated in the statute.[18] If a record is simply made exempt from disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.[19]

In *Ragsdale v. State*,[20] the Florida Supreme Court held that the applicability of a particular exemption is determined by the document being withheld, not by the identity of the agency possessing the record. Quoting from *City of Riviera Beach v. Barfield*,[21] a case in which documents were given from one agency to another during an active criminal investigation, the *Ragsdale* court refuted the proposition that inter-agency transfer of a document nullifies the exempt status of a record:

> "We conclude that when a criminal justice agency transfers protected information to another criminal justice agency, the information retains its exempt status. We believe that such a conclusion fosters the underlying purpose of section 119.07(3)(d), which is to prevent premature *public* disclosure of criminal investigative information since disclosure could impede an ongoing investigation or allow a suspect to avoid apprehension or escape detection. In determining whether or not to compel disclosure of active criminal investigative or intelligence information, *the primary focus must be on the statutory classification of the information sought rather than upon in whose hands the information rests*. Had the legislature intended the exemption for active criminal investigative

[12] Art. I, s. 24(c) of the State Constitution.
[13] *Ibid*.
[14] Chapter 119, F.S.
[15] Section 119.07(1)(b), F.S.
[16] Section 119.07(1)(c) and (d), F.S.
[17] *WFTV, Inc., v. The School Board of Seminole, etc., et al*, 874 So.2d 48 (5th DCA), rev. denied 892 So.2d 1015 (Fla. 2004).
[18] *Ibid* at 53, *see also*, Attorney General Opinion 85-62.
[19] *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA), review denied, 589 So.2d 289 (Fla. 1991).
[20] 720 So.2d 203 (Fla. 1998).
[21] 642 So.2d 1135, 1137 (Fla. 4th DCA 1994).

> information to evaporate upon the sharing of that information with another criminal justice agency, it would have expressly provided so in the statute." Although the information sought in this case is not information currently being used in an active criminal investigation, the rationale is the same; that is, that the focus in determining whether a document has lost its status as a public record must be on the policy behind the exemption and not on the simple fact that the information has changed agency hands. Thus, if the State has access to information that is exempt from public records disclosure due to confidentiality or other public policy concerns, that information does not lose its exempt status simply because it was provided to the State during the course of its criminal investigation.[22]

It should be noted that the definition of "agency" provided in the Public Records Law includes the phrase "and any other public or private agency, person, partnership, corporation, or business entity *acting on behalf of any public agency*" (emphasis added). Agencies are often authorized, and in some instances are required, to "outsource" certain functions. Under the current case law standard, agencies are not required to have explicit statutory authority to release public records in their control to their agents. Their agents, however, are required to comply with the same public records custodial requirements with which the agency must comply.

The Open Government Sunset Review Act - The Open Government Sunset Review Act[23] provides for the systematic review of an exemption five years after its enactment. Each year, by June 1, the Division of Statutory Revision of the Joint Legislative Management Committee is required to certify to the President of the Senate and the Speaker of the House of Representatives the language and statutory citation of each exemption scheduled for repeal the following year.

The act states that an exemption may be created or expanded only if it serves an identifiable public purpose and if the exemption is no broader than necessary to meet the public purpose it serves. An identifiable public purpose is served if the exemption meets one of three specified criteria and if the Legislature finds that the purpose is sufficiently compelling to override the strong public policy of open government and cannot be accomplished without the exemption. An identifiable public purpose is served if the exemption:

- [a]llows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
- [p]rotects information of a sensitive personal nature concerning individuals, the release of which would be defamatory or cause unwarranted damage to the good name or reputation of such individuals, or would jeopardize their safety; or
- [p]rotects information of a confidential nature concerning entities, including, but not limited to, a formula, pattern, device, combination of devices, or compilation of information that is used to protect or further a business advantage over those who do not

[22] *Ragsdale*, 720 So.2d at 206 (quoting *City of Riviera Beach*, 642 So. 2d at 1137) (second emphasis added by *Ragsdale* court).
[23] Section 119.15, F.S.

> know or use it, the disclosure of which would injure the affected entity in the marketplace.[24]

The act also requires consideration of the following:

- What specific records or meetings are affected by the exemption?
- Whom does the exemption uniquely affect, as opposed to the general public?
- What is the identifiable public purpose or goal of the exemption?
- Can the information contained in the records or discussed in the meeting by readily obtained by alternative means? If yes, how?
- Is the record or meeting protected by another exemption?
- Are there multiple exemptions for the same type of record or meeting that it would be appropriate to merge?

While the standards in the Open Government Sunset Review Act may appear to limit the Legislature in the exemption review process, those aspects of the act that are only statutory as opposed to constitutional, do not limit the Legislature because one session of the Legislature cannot bind another.[25] The Legislature is only limited in its review process by constitutional requirements.

Further, s. 119.15(4) (e), F.S., makes explicit that:

> … notwithstanding s. 768.28 or any other law, neither the state or its political subdivisions nor any other public body shall be made party to any suit in any court or incur any liability for the repeal or revival and reenactment of any exemption under this section. The failure of the Legislature to comply strictly with this section does not invalidate an otherwise valid reenactment.

Deferred Presentment Providers - "Deferred presentment providers," more commonly known as "pay-day lenders," are businesses that charge a fee for cashing a customer's check and agreeing to hold that check for a certain number of days prior to depositing or redeeming the check.

The Deferred Presentment Act was enacted in Florida in 2001, codified as part IV of chapter 560, F.S.[26] This act supplemented requirements that applied to check cashing operations, generally. The law requires any person engaged in a deferred presentment transaction (a "deferred presentment provider") to be registered with the Office of Financial Regulation (OFR) and be subject to its regulation.

The law establishes $500, plus allowable fees, as the maximum face amount of a check that may be taken for deferred presentment. The maximum fee is 10 percent of the face amount, plus a maximum $5.00 verification fee.[27] Upon receipt of the customer's ("drawer's") check, the

[24] Section 119.15(4) (b), F.S.
[25] *Straughn v. Camp*, 293 So.2d 689, 694 (Fla. 1974).
[26] Ch. 2001-119, Laws of Fla., which created ss. 560.404-560.408, F.S., designated as Part IV of ch. 560, F.S.
[27] Section 560.404(5) and (6), F.S. The maximum $5.00 verification fee is established by Rule 69V-560.801, Fla. Admin.

deferred presentment provider must immediately provide the drawer with the amount of the check, minus the allowable fees. For example, a provider may advance $500 in exchange for the drawer's $555 post-dated check. The deferred presentment agreement may not be for a term in excess of 31 days or less than 7 days. The provider is prohibited from renewing or extending any transaction ("rollover") or from holding more than one outstanding check for any one drawer at any one time.[28]

Database of Deferred Presentment Transactions

A deferred presentment provider is prohibited from entering into a transaction with a person who has an outstanding transaction with any other provider, or with a person whose previous transaction with any provider has been terminated for less than 24 hours.[29] To verify such information, the provider must access a database established by OFR. The OFR is required to establish this database of all deferred presentment transactions in the state and give providers real-time access through an Internet connection. OFR contracts with a private vendor, Veritec Solutions, Inc., to maintain the database. Providers must submit the following data on each transaction, as required by OFR:

- drawer's name, address, and drivers' license number;
- drawer's social security or employment authorization alien registration number;
- drawer's date of birth;
- amount and date of the transaction;
- date the transaction is closed; and
- check number. [30]

A separate act in 2001 created a public records exemption for "identifying information" contained in the database.[31] The identifying information contained in the database is confidential and exempt from the Public Records Law, except that the identifying information in the database may be accessed by deferred presentment providers to verify whether any deferred presentment transactions are outstanding for a particular person and by OFR for the purpose of maintaining the database. This statutory exemption stands repealed on October 2, 2006, unless reviewed and reenacted by the Legislature, pursuant to the Open Government Sunset Review Act of 1995.

The Office of Financial Regulation considers all of the information in the database to be "identifying information" that is confidential and exempt. This includes not only information that identifies the drawer (name, social security or employment authorization alien registration number, address, driver's license number, date of birth), but also information that identifies the number and amount of transactions for a particular provider. All of the information is considered to be "identifying information" regarding a particular transaction. However, the 2001 act creating this exemption contained a public necessity statement that refers only to protecting the identity of the individual, not the business.[32] The broader interpretation by OFR is influenced by another

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Code, as authorized by s. 560.309(4), F.S.

[28] Section 560.404(8) and (18), F.S.

[29] Section 560.404(19), F.S.

[30] Section 560.404(23), F.S. All of the information listed is required by statute, except the drawer's date of birth and check number.

[31] Ch. 2001-268, Laws of Fla.; s. 560.4041, F.S.

[32] *The Legislature finds that the exemption from public-records requirements which is provided in this act is a public*

statute that exempts from public disclosure all quarterly reports required to be submitted to OFR by deferred presentment providers.[33] These quarterly reports contain such information as required by rule, which includes monthly totals of the number, face amount, and fees charged for deferred presentment transactions. The 2000 act that created this other public records exemption made legislative findings that quarterly reports contain detailed business information, proprietary matters, and market share data which, if disclosed to a third party, could harm the money transmitter and result in a competitive disadvantage if used by another money transmitter.[34] Since these quarterly reports are confidential and exempt, OFR believes it would be inconsistent and improper to reveal such information from the database, supporting a broad interpretation of the exemption for "identifying information."

The statute provides that "the database may be accessed by deferred presentment providers to verify whether any deferred presentment transactions are outstanding for a particular person." As implemented by OFR and specified by rule, a deferred presentment provider has access to all information that it enters into the database, but has limited access to information submitted by other providers.[35] A provider can only obtain an eligibility determination for a particular person, based on the identifying information provided by that provider. The inquiry states only that a person is eligible or ineligible for a new transaction and a general description of the reason why a person is ineligible. The person (drawer) seeking the transaction may make a direct inquiry to the vendor to request a more detailed explanation of a particular transaction that was the basis for an ineligibility determination.

Committee Staff Report and Recommendations - In September, 2005, the staff of the Senate Banking and Insurance Committee published, *Open Government Sunset Review of s. 560.4041, F.S., Deferred Presentment Providers*, (Interim Project Report 2006-202). The report recommended that the public records exemption under review be reenacted and amended. Rather than exempting "identifying information" in the database, the report recommended that the law more specifically exempt information that identifies either the person who writes the check ("drawer") or the deferred presentment provider. This would be consistent with how the exemption has been interpreted and applied by OFR.

The report stated that exempting information identifying an individual person is justified due to the sensitive, personal nature of the information, which would be an unwarranted invasion of privacy if disclosed, and is further justified by the need to prevent identity theft against the individual and related fraud crimes. Exempting information identifying a business engaged in deferred presentment transactions is justified because the information in the database for each transaction is proprietary business information, the disclosure of which could harm the

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necessity due to the need to prevent identity theft and related crimes and to prevent borrowers who may already be in financial difficulty from being put at further risk from the threat of fraud. The Legislature further finds that to make such identifying information available would be an unwarranted invasion of the privacy of the person who furnishes to a deferred presentment provider the information that the provider submits to the Department of Banking and Finance [currently, OFR] *for incorporation into the database.* (Sec. 2, ch. 2001- 268, Laws of Fla.)

[33] Section 560.129(3), F.S., exempts from public disclosure all quarterly reports submitted by money transmitters under s. 560.118(2)(b), F.S.

[34] Ch. 2000-293, Laws of Fla.

[35] Rule 69V-560.912, Fla. Admin. Code.

provider's business and could result in a competitive disadvantage if used by another provider or other money transmitter.

The report also recommended that the law be amended to more clearly specify the information from the database that may be provided to deferred presentment providers, consistent with OFR's current rules, to allow providers to access information that it has entered into the database and to obtain an eligibility determination for a particular person based on information in the database.

An alternative recommendation is to create a single new exemption to replace the two exemptions currently provided for the quarterly reports submitted by money transmitters [s. 560.129(3), F.S.] and the identifying information submitted by deferred presentment providers to the OFR database [s. 560.4041, F.S.]. A single exemption should exempt information on financial transactions entered into by a money transmitter that is specific to or identifies a particular money transmitter or individual.

III. Effect of Proposed Changes:

The bill reenacts the exemption for the deferred presentment provider database that is maintained by the OFR of all deferred presentment transactions. The bill clarifies the exemption by providing that information that identifies a drawer or a deferred presentment provider is confidential and exempt.

Further, the bill expressly permits a deferred presentment provider to access the information that it has entered into the database. The bill also expressly clarifies that the deferred presentment provider may obtain an eligibility determination for a particular drawer based on information in the database.

The exemption, which is scheduled for repeal on October 2, 2006, is also saved from repeal by the bill.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

See, *supra*.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill protects proprietary business information of deferred presentment providers by exempting from public disclosure specific information about deferred presentment transactions entered into by a provider.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Summary of Amendments:

None.